Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOU-HAN, INC., a Florida Corporation,
Petitioner,

v.

THE CITY OF ST. PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida.
Respondents.

PETITION FOR WRIT OF CERTIORARI

LUKE CHARLES LIROT
2000 Magnolia Drive
Clearwater, Florida 34624
(813) 874-2030
(813) 879-0723 FAX

Counsel for Petitioner

52 pp

QUESTION PRESENTED

I. Whether an applicant for a variance from a zoning regulation, is entitled, under the Constitution of the United States, to a fair and impartial tribunal in such a quasi-judicial/administrative action, and, if denied such a fair and impartial tribunal, whether this results in a deprivation of due process.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Dou-Han, Inc., is a Florida Corporation doing business in Pinellas County, Florida. Respondent, the City of St. Petersburg, is a Florida Municipal Corporation.

Neither party has any parent or subsidiary corporation as contemplated by Rule 29.1.

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PETITION FOR WRIT OF CERTIORARI

Dou-Han, Inc., a Florida Corporation, respectfully petitions this Court for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Second District in this case.

OPINIONS BELOW

The opinion of the Court of Appeal will be reported as a table opinion at ___ So.2d ___ (Fla. 2d DCA 1994). Rehearing was denied in a table opinion which will be reported at ___ So.2d ___. [1] The opinion of the Circuit Court (App. *infra*, at B-1 - B-3) is unreported.

JURISDICTION

The Court of Appeal entered its judgment on June 3, 1994. Rehearing was sought and was denied on July 7, 1994. On September 29, 1993, this Court granted an extension of time in which to file this Petition until November 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Under Florida law, a *per curiam* affirmation, without opinion, is not subject to review by the Supreme Court of Florida.[2]

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[1] These table opinions are, as yet, unreported.

[2] Constitution of the State of Florida, Article V, § 3.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 5

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "...nor shall any person be ... deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

42 U.S.C. § 1983

42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of state law ... subjects, or causes

to be subjected, any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, ..." 42 U.S.C. § 1983.

ORDINANCE PROVISIONS INVOLVED

City of St. Petersburg Ordinance 72-G

Ordinance 72-G, § (h) provides in pertinent part:

> "If a written request is filed with the City Manager, a public hearing before the Board of Adjustment shall be scheduled to consider the request for a variance. ...
>
> "The Board of Adjustment shall hear and consider evidence offered by any interested person in a public hearing scheduled with public notice. Public notice shall be given pursuant to the requirements for variance requests to the Board of Adjustment ...
>
> "The Board of Adjustment may, in its discretion, grant a variance, with reasonable conditions, from the locational restrictions of this [Ordinance] if it makes the following findings: ...

City of St. Petersburg Ordinance 79-G

Ordinance 79-G strikes each reference in Ordinance 72-G to the "Board of Adjustment" and replaces it with a reference to the "City Council."

STATEMENT OF THE CASE

Dou-Han owns and operates a business in the City of St. Petersburg, which business offers to the public at large a form of expression protected by the First Amendment to the Constitution of the United States: books, magazines and video tapes which are non-obscene but sexually explicit. Dou-Han commenced its business in the late summer of 1992.

In the fall of 1993, the City of St. Petersburg began the process of adopting adult use zoning regulations, which would regulate the location of businesses such as that of Dou-Han. The City's adult use zoning regulations were ultimately adopted on January 28, 1993, by Ordinance 72-G.

Ordinance 72-G purported to provide for the "amortization" of existing, non-conforming adult uses by requiring such businesses to close, change the nature of their business, or relocate within one year. In accordance with the Constitutional requirement for such a provision, Ordinance 72-G provided a mechanism for an adult use made non-conforming by the ordinance to seek and obtain

a variance from the adult use zoning regulations, and thus provided the option of a seeking a variance (waiver) from the regulations.

The variance process established in Ordinance 72-G was the same process employed by the City for other applications for variances from its zoning regulations. Jurisdiction over variances was given to the City's Board of Adjustment which has jurisdiction over **all** other variance applications under the City's zoning regulations.

(Dou-Han had previously been required, as the result of the action of a neighboring property owner, to participate in an administrative appeal before the Board of Adjustment. In dealing with that appeal, the Board proved to be fair and impartial, and Dou-Han prevailed on the merits.)

Immediately after the purported adoption of Ordinance 72-G, the City set about amending the Ordinance to transfer jurisdiction for variances from the Board of Adjustment to the City Council. In the words of the City's Mayor, this transfer was to close a "loophole" in the Ordinance, which loophole might have resulted in the granting of variances from the City's adult use zoning regulations. (App., *infra* at A-8.)

During the course of the adoption of Ordinance 72-G, many members of the City Council, now charged with adjudicating variances from the regulations, showed bias

and partiality against adult uses such as Dou-Han's. This bias and partiality are reflected in comments such as the following:

> "... we as a community [must] stand up for what is morally right and insist that the moral fabric of our community be reinstated. I feel that very, very strongly and, you know, we will do what we can do here. ... I strongly support [the Adult Use Regulations]. ... my only question is there anything we can do to make it stronger, and my message to the sleeze [*sic*] merchants are you are not welcome in our community and please take your filth someplace else." Council member Kone.

> "... I will ... support this amendment and make it as strong as I can possibly make it." Council member Fillyau.

> "... we want to send a strong statement that reflects what you have told us here tonight [to adopt the most restrictive ordinance possible]." Council member Stewart.

> "So I will go along with the legal ramification for the toughest law that we possibly can and that could stand up in court ..." Council member Fillyau.

> "... after the first [public hearing] I was in favor of the 1,000 feet for all uses, which ends up giving us six locations in the City. As far as I am concerned, the fewer the better ..." Council member Cole.

During the pendency of this matter below, after Dou-Han failed to obtain relief, Dou-Han and at least five other adult uses applied to the City for variances from the adult use zoning regulations. Every application for a variance, heard by the City Council, including one where City staff recommended approval, was denied by the City Council, which continued to show bias and partiality against the adult uses.

PROCEEDINGS BELOW

Dou-Han brought this action under 42 U.S.C. § 1983, *et.seq.*, in state court, seeking preliminary and permanent relief in the form of a Declaratory Judgment and injunctive relief, the result of which would have been to require the variances to be heard by the City's fair and impartial Board of Adjustment. The state court had jurisdiction of this matter pursuant to the ruling of this Court in *Howlett v. Rose*, 496 U.S. 356 (1990).

After an Amended Complaint (App., *infra*, at A-1 - A-27) was filed to clarify the issues, the City moved to dismiss the complaint, for failure to state a cause of action. The trial court dismissed the action, and Florida's Second District Court of Appeal affirmed the trial court, without a written opinion. The District Court also denied rehearing, and this Petition for Writ of Certiorari ensued.

ARGUMENT: REASONS FOR ISSUING THE WRIT OF CERTIORARI

In addition to the obvious desirability of correcting the error below, there is a compelling reason why certiorari should be granted in this case.

The actions of administering a zoning ordinance through processes such as variances, [1] have always been construed as quasi-judicial or administrative: *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, (11th Cir. 1993). However, recent changes in the law throughout the country [2] have resulted in a legal determination that rezoning applications for single parcels or small areas are quasi-judicial in nature as well.

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[1] Which are Constitutionally mandated: *Azalea Corporation v. City of Richmond*, 112 S.E.2d 862 (Va. 1960); *Reynolds v. Zoning Board of Review of Town of Lincoln*, 191 A.2d 350 (R.I. 1963); *Bouley v. City of Nashua*, 205 A.2d 38 (N.H. 1964); *Consolidated Management v. City of Cleveland*, 452 N.E.2d 1287 (Oh. 1983); *National Land and Investment Company v. Kohn*, 215 A.2d 597 (Pa. 1965); *Greenawalt v. Zoning Board of Adjustment of the City of Davenport*, 345 N.W.2d 537 (Iowa 1984); *Vinson v. Medley*, 737 P.2d 932 (Ok. 1987).

[2] *Snyder v. Brevard County Board of County Commissioners*, 595 So.2d 65 (Fla. 5th DCA 1991); *affirmed in part, reversed in part*, 627 So.2d 469 (Fla. 1992); *Fasano v. Board of County Commissioners*, 507 P.2d 23 (Or. 1973); *Board of Supervisors v. Snell Construction Co.*, 202 S.E.2d 889 (Va. 1974); *Forman v. Eagle Thrifty Drugs and Markets*, 516 P.2d 1234 (Nev. 1973); *Town v. Land Use Commission*, 524 P.2d 84 (Ha. 1974); *Margolis v. District Court*, 638 P.2d 297 (Col. 1981).

Accordingly, the Constitutionally mandated fairness and impartiality of the tribunals administering zoning ordinances throughout the country, has become of paramount importance in land use law, and a decision from this Court with respect to a fair and impartial tribunal in land use decisions will be of benefit to local governments and property owners throughout the country.

I. The Florida State Courts were improper in failing to invalidate legislation that required administrative hearings to be conducted in front of a governing body which clearly provided evidence that it was not a "fair and impartial tribunal," and in failing to find that this violated the requirements of the Due Process Clause

The Due Process Clause of the Constitution of the United States requires that a waiver or variance application be held before an impartial tribunal. This Court recently restated the Constitutional requirement for a fair and impartial tribunal in quasi-judicial proceedings, holding:

> "As against these supposed threats to the trustees' neutrality, due process requires 'a neutral and detached judge in the first instance,' *Ward v. Village of Monroeville*, 409 U.S. 57, 61 - 62, ... (1972), and the command is no different when the legislature delegates adjudicative functions to a private party. See *Schweiker v. McClure*, 456 U.S. 188, 195, ... (1982). 'That officers acting in a judicial or quasi-judicial capacity are disqualified

by their interest in the controversy to be decided is, of course, the general rule.' *Tumey v. Ohio*, 273 U.S. 516, 522 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 and n.2 ... (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation '"which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true. ..."' *Ward, supra*, 409 U.S. at 60, ... (quoting *Tumey, supra*, 273 U.S. at 532, ...) Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U.S. at 61, ...

"'(J)ustice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial (even) by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties". *Marshall v. Jerrico, Inc., supra*, 446 U.S. at 243 ..." *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S.Ct. 2264 (1993).

Thus, not only did the Circuit Court err in finding a need to exhaust administrative remedies (*Howlett, supra*,) but it also erred in finding that an appeal or trial *de novo*

after the denial of the variance would be Constitutionally adequate.

The Circuit Courts of Appeals have reached similar conclusions:

> "An impartial tribunal is an essential element of a due process hearing. *Staton v. Mayes*, 552 F.2d 908, 913 (10th Cir.), *cert. denied*, 434 U.S. 907, 98 S.Ct. 309, 54 L.Ed.2d 195 (1977); *Bogart v. Unified School District No. 298*, 432 F.Supp. 895, 903, (D.Kan. 1977). A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. *Staton*, 552 F.2d at 914-15; *Bogart*, 432 F.Supp. at 904. ..." *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983).
>
> "The second element of due process is the right to a hearing by an impartial tribunal. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). *In. re. Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). ..." *Dirt, Inc., v. Mobile County Commission*, 739 F.2d 1562 (11th Cir. 1984).
>
> "... Due process essentially requires that the procedures be fair. *In. re. Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). ..."

Securities & Exchange Commission v. Elliott, 953 F.2d 1560 (11th Cir. 1992).

The Eleventh Circuit has elaborated on this test in a mortgage foreclosure action, holding:

> "The second due process requirement, a meaningful opportunity to contest an adverse decision or action, is more problematic. A fair hearing requires an impartial arbiter. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-243 & n.2, ... (1980). We have serious reservations about the neutrality of the hearing officers. The regulations establish that the hearing officer is a nearby district director. On its face, the regulation appears less than neutral. The nearby district director will be evaluating a decision to foreclose made by a peer and already approved by his boss. ... The Supreme Court in *Schweiker v. McClure*, 456 U.S. 188, 195 ... has stated that hearing officers are presumed to be unbiased until a conflict of interest or other specific reason for disqualification is shown. It is the plaintiff's burden of proof to show a conflict of interest. *Id.* at 196 ... At trial, the plaintiffs may be able to further demonstrate a conflict of interest in the hearing officers. On the surface, the plaintiffs have shown a substantial likelihood that a conflict may exist that would impinge the hearing officer's impartiality." *Johnson v. United States Department of Agriculture*, 734 F.2d 774 (11th Cir. 1984).

In the instant case, the Plaintiff's challenge to the lack of a fair and impartial tribunal was dismissed for Plaintiff's failure to exhaust administrative remedies. Such exhaustion is not required in an action, such as this, brought under 42 U.S.C. § 1983. Therefore, the Courts below erred in not trying this case on the merits to determine if Dou-Han would be afforded a quasi-judicial hearing before a fair and impartial tribunal. Even in light of the fact that some of the elected officials made more egregious statements on the public record than their colleagues, the mere hint of impartiality by even one member of a quasi-judicial body renders any action taken thereby irrevocably suspect and clearly conflicts with prior decisions of this Honorable Court, and the Circuit Courts of Appeal.

CONCLUSION

This Court has ruled in several cases (*Concrete Pipe, Marshall, Tumey* and *Schweiker, supra*) that, as a matter of due process of law, a quasi-judicial process must be conducted by a fair and impartial tribunal. This Court has further held that post-hearing remedies are Constitutionally inadequate.

APPENDIX A

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

DOU-HAN, INC. a Florida Corporation,

Plaintiff,

v. Case No. 93-1240-CI-16

THE CITY OF ST. PETERSBURG, a Florida Municipal Corporation,

Defendant.
_____/

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, DOU-HAN, INC., a Florida Corporation, sues Defendant, THE CITY OF ST. PETERSBURG, a Florida Municipal Corporation, and for its Amended Complaint says as follows:

I. JURISDICTION

1. This is an action for Declaratory and Injunctive Relief.

2. This in an action related to zoning regulations imposed on real property and on a business property each

worth more than $15,000.

3. The jurisdiction of this Court is invoked pursuant to Chapter 86, Florida Statutes, which authorizes Circuit Courts to enter Declaratory Judgments related to controversies within the monetary jurisdiction of the Circuit Court.

4. The jurisdiction of this Court is also invoked pursuant to § 26.012(3), Florida Statutes, which authorizes the Circuit Courts to enter injunctions.

5. The jurisdiction of this Court is also invoked pursuant to 42 U.S.C. §§ 1983, 1985 and 1988. This is a cause of action arising under the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

II. THE PARTIES.

6. Plaintiff, DOU-HAN, INC., a Florida Corporation, (hereinafter "DOU-HAN",) is the leasehold tenant of certain premises located within the City of St. Petersburg, known municipally as 3800 - 66th Street North.

7. DOU-HAN is the owner of the going concern doing business as the Sixty Sixer Video Adult Center, pursuant to a properly filed Fictitious Name registration, and located on the premises described in the preceding paragraph.

8. DOU-HAN's business includes the display, rental and sale of videotapes, and the sale of books and magazines some of which are "sexually oriented", and all of which are protected material pursuant to the First Amendment to the Constitution of the United States.

9. Defendant, the City of St. Petersburg (hereinafter "City"), is a Florida Municipal Corporation, organized and existing pursuant to Article VIII, § 2 of the Constitution of the State of Florida, and pursuant to Chapter 166, Florida Statutes.

III. GENERAL ALLEGATIONS

10. Plaintiff owns and operates a business known as the Sixty Sixer Adult Video on the premises described in ¶ 6, *supra*, which business has been in operation since April, 1992.

11. Plaintiff obtained all necessary building, site plan, and Zoning approvals and a Certificate of Occupancy from Defendant City prior to opening and beginning to operate its business.

12. Plaintiff's business is within that class of land uses known generally as "Adult Uses", and is specifically within the definition of "Adult Uses" as purportedly established in City of St. Petersburg Ordinance 72-G. (Exhibit A, attached to the Original Complaint herein, and made a part hereof by reference.)

13. Subsequent to Plaintiff's entering into a lease for the real property described in ¶ 6, *supra*, and also subsequent to the acquisition by Plaintiff of all necessary Certificates of Occupancy, Occupational Licenses, inspections and other approvals and permits from the City of St. Petersburg, Defendant, City began to contemplate the passage of an "Adult Use Zoning Ordinance", now known as Ordinance 72-G.

14. All actions of Defendant City, complained of herein, were actions under color of state law, and were custom and usage of Defendant, City.

15. The ultimately adopted City of St. Petersburg Adult Use Zoning Ordinance (72-G) purports to:

a. regulate the locations in which new Adult Uses may locate;

b. require existing Adult Uses which do not meet the alleged locational criteria to:

i. relocate;

ii. change the nature of their business; OR

iii. obtain a waiver of the locational criteria of the Ordinance;

c. provide a mechanism for waivers of the separation requirements.

16. Plaintiff's business allegedly became a non-conforming use pursuant to Ordinance 72-G, because, even though it was legal in all respects when established as a going concern, it was subsequently zoned to be in a location unacceptable for Adult Uses according to Ordinance 72-G.

17. After a lengthy procedural history, not germane to this action, Defendant City purported to adopt Ordinance 72-G, establishing adult use zoning regulations for the City of St. Petersburg.

18. Ordinance 72-G was finally adopted on January 28, 1993, and was effective upon its adoption.

19. Section (f) 3. (2) of Ordinance 72-G purports to permit Adult Uses found not to be in compliance with the

Ordinance to appeal the determination of non-compliance to the City of St. Petersburg Board of Adjustment prior to January 28, 1994.

20. Subsequent to the alleged adoption of Ordinance 72-G, Defendant City, purported to adopt Ordinance 79-G, (Exhibit B, attached to the Original Complaint herein, and made a part hereof by reference,) which, in turn, purports to amend Ordinance 72-G, in the following ways:

a. By amending the definition of "Law Enforcement Officer";

b. By correcting references to a 400 foot separation [1] to 700 feet; and

c. By substituting the City Council of the City of St. Petersburg for the Board of Adjustment as the agency with jurisdiction to grant waivers from the separation requirements of Ordinance 72-G.

21. Both Ordinances 72-G and 79-G purport to amend Chapter 29 of the City of St. Petersburg Code, the Zoning Code.

22. The Board of Adjustment is a quasi-judicial agency, which, pursuant to Chapter 29, City of St. Petersburg Code, is otherwise responsible for the consideration and granting and issuance of waivers and variances.

23. Plaintiff, DOU-HAN, INC., has previously been compelled to appear before the Board of Adjustment

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[1] The originally proposed separation requirement.

as the result of actions by a neighboring business which resulted in a previous lawsuit (*Dou-Han Inc v. City of St. Petersburg Board of Adjustment and Albertsons, Inc.*, {Case No. 92-4128-CI-16}).

24. In the previous action, DOU-HAN, Inc. was forced to defend itself from the alleged tortious interference with its on-going business by Albertsons' efforts to have the Board of Adjustment overturn a Zoning Administrator's determination that DOU-HAN's business was permitted and lawful under the City of St. Petersburg Zoning Code.

25. In the previous action, DOU-HAN, Inc. was allowed a full and fair opportunity to present relevant evidence to the Board of Adjustment in support of the Plaintiff's legitimate desire to protect its business. Before the Board of Adjustment, the Plaintiff received fair treatment, and a fair hearing, and succeeded on the merits in this quasi-judicial forum.

26. In contrast, Defendant's City Council has repeatedly tried to limit Adult Uses in the City, to impose the "most restrictive" regulations possible, and to preclude the continuation of the existing Adult Uses, including that of Plaintiff. See, *e.g.*, City Council Minutes of 12/3/92, at 495, (Exhibit C,, attached to the Original Complaint herein, and made a part hereof by reference).

27. Further, in promoting Ordinance 79-G, the Mayor of St. Petersburg said:

> "This is in order to fill a **loophole** in cases from -- from here on adult uses or entertainment centers would go to the Board of Adjustment and it if was granted, the variance was granted and then the

neighborhood appealed, instead of being able to appeal to us like the EDC does, the appeals from the Board of Adjustment goes to the Circuit Court. That makes it really tough. Now you got attorney -- attorneys involved and maybe lengthy litigation that would be very difficult. This brings it not only away from the Board of Adjustment, it brings it right to us. So that we can take immediate action, have -- have public hearings, and that is -- **that plugs up that loophole.**" [Emphasis added] (Exhibit D, attached to the Original Complaint herein, and made a part hereof by reference, at p. 3.)

28. Accordingly, Plaintiff, DOU-HAN, INC., has reason to believe, and does believe, that any waiver application presented to the City Council would be rejected out of hand, without any real or meaningful consideration of the merits of any tendered waiver application.

29. However, Plaintiff does believe that, in consideration of the waiver requirements {Ordinance 72-G, (Exhibit A) pp. 24-25}, if given a full and fair opportunity to present all relevant evidence, this evidence would show clear entitlement to the granting of any waiver sought, if such evidence were presented to, and considered by a truly impartial forum, properly acting in a quasi-judicial manner.

30. Plaintiff specifically focusses the instant challenge on the transfer of the waiver jurisdiction from the Board of Adjustment to the City Council, while expressly and unconditionally reserving its right to raise procedural and substantive challenges to Ordinance 72-G.

31. Plaintiff is bringing the instant action for the sole and discrete purpose of attempting to have an impartial tribunal conduct any quasi-judicial waiver hearing afforded as a matter of right in Ordinance 72-G. [2]

32. Because of the doctrine of exhaustion of administrative remedies, the Plaintiff herein challenges **only Ordinance 79-G** and expressly and unconditionally states that this action may not be used to constitute a bar to any subsequent action against Ordinance 72-G, in that any such challenge would be premature unless Plaintiff is not afforded a **full and fair hearing before an impartial tribunal, or is unsuccessful therein!**

33. Plaintiff, DOU-HAN, INC., asserts that its position, set forth in this Complaint, is legally sound and supported by fact and law. The Defendant's actions, however, have created a *bona fide* controversy between the parties and Plaintiff is in doubt as to its rights, privileges and immunities with respect to Ordinance 79-G.. Plaintiff requires, therefore, a declaratory judgment declaring its rights, privileges and immunities.

34. Plaintiff, DOU-HAN, INC., has no adequate remedy at law. No amount of money damages could adequately compensate the Plaintiff for the irreparable harm described herein.

35. Plaintiff, DOU-HAN, Inc. will suffer irreparable harm if Plaintiff is denied a waiver hearing before an impartial quasi-judicial agency.

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[2] The results of which hearing, would be subject to review by a Petition for a Writ of Common Law Certiorari.

COUNT I

IMPROPER ADOPTION -

NOTICE REQUIRED BY § 286.0105,

FLORIDA STATUTES

36. Plaintiff re-alleges and incorporates ¶¶ 1 through 35, *supra*, as if fully set out herein.

37. Only one public hearing on Ordinance 79-G was held, and only one notice of said hearing was given. (Exhibit F, attached to the Original Complaint herein, and made a part hereof by reference,)

38. It is undisputed that the hearing of which Notice was purportedly given by Exhibit F, was a hearing for which such notice was required to be given pursuant to § 166.041, Florida Statutes 1991.

39. It is further undisputed that the City of St. Petersburg is an entity which is required to give the advice mandated by § 286.0105, Florida Statutes, in the notices of its public hearings, and that the City of St. Petersburg periodically gives such advice. See, *e.g.* Exhibit G, attached hereto and made a part hereof by reference.

40. Section 286.0105, Florida Statutes, provides:

> **"Notices of meetings and hearings must advise that a record is required to appeal.** -- Each board, commission or agency of this state, or of any political subdivision thereof **shall include** in the notice of any meeting or hearing, **if notice of the meeting or hearing is required**, of such

board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission, with respect to any matter considered at such meeting or hearing, he will need a record of the proceedings, and that, for such purpose, he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. ..." [Emphasis added]

41. As evidenced by Exhibit G, Defendant, the City of St. Petersburg, at least periodically provides the advice required by § 286.0105, Florida Statutes on the notices of public meetings required by § 166.041, Florida Statutes.

42. However, as evidenced by Exhibit F, the required advice did not appear on the Notice of Ordinance 79-G, and Ordinance 79-G is therefore null and void *ab initio*.

WHEREFORE, DOU-HAN, INC., prays for a declaratory judgment, for injunction and supplemental relief awarding some or all of the following relief:

a. Declaring Ordinance 79-G to have been improperly adopted for the failure of Defendant City to provide the advice

mandatorily required by § 286.0105, Florida Statutes;

b. Issuing a Temporary Injunction, enjoining the Defendant City from enforcing or attempting to enforce Ordinance 79-G against Plaintiff, pending the issuance of a Permanent Injunction;

c. Issuing a Permanent Injunction enjoining the Defendant City from attempting to enforce Ordinance 79-G against Plaintiff; and

d. Awarding costs and such other supplemental relief as may be just and appropriate.

COUNT II
IMPROPER ADOPTION OF
A ZONING ORDINANCE

43. Plaintiff re-alleges and incorporates ¶¶ 1 through 35, *supra*, as if fully set out herein.

44. Ordinance 79-G is an Ordinance initiated by the governing body of the City of St. Petersburg.

45. Section 4 of Ordinance 79-G substantially changes permitted use categories in Zoning Districts by amending Chapter 29-224 (f)2.D. of the City of St. Petersburg City Code by reference to the "known locations of any churches, schools, child care facilities, public parks, residential uses or other existing or proposed adult uses within approximately 700 feet ..."

46. Ordinance 79-G further substantially changes permitted use categories in Zoning Districts by amending Chapter 29-224 of the City of St. Petersburg City Code to substitute the City Council for the Board of Adjustment as the agency with jurisdiction to grant waivers from the adult use zoning regulations.

47. The Board of Adjustment would permit Adult Uses in Zoning Districts by waiver, based on the merits of particular applications.

48. Based on the totality of the record of the adoption of Defendant City's adult use zoning regulations, Plaintiff has reason to believe, and does believe, that the City Council would not be impartial in hearing any tendered waiver application filed on behalf of the Plaintiff and would deny same, thereby changing the permitted uses in Zoning Districts.

49. Further, Ordinance 79-G, amends Ordinance 72-G and Chapter 29, City of St. Petersburg Code.

50. Therefore, Ordinance 79-G was required to be enacted with the same dignity as Ordinance 72-G and as other Ordinances establishing the text of Chapter 29.

51. In the enactment of Ordinance 79-G, the record is clear that Defendant City departed from the essential requirements for the adoption of Municipal Zoning Ordinances set out in § 166.041(3)(c) in the following substantial and material ways:

a. Only one public hearing was held;

b. The public hearing was held before 5:00 p.m.

c. No notice of the date, time and place of a second public hearing was given;

d. Only one notice of public hearing was given;

e. The notice given (Exhibit F,) was not a 1/4 page notice;

f. The notice did not include a geographic location map;

g. The notice did not include the headline: "Notice of Zoning (Permitted Use) Change;

h. The notice did not contain the text mandated by § 166.041 (3)(c)2.b., Florida Statutes.

52. Therefore, Ordinance 79-G is null and void *ab initio*.

WHEREFORE, DOU-HAN, INC., prays for a declaratory judgment, for injunction and supplemental relief awarding some or all of the following relief:

a. Declaring Ordinance 79-G to be an Ordinance substantially changing the permitted uses in Zoning Districts and amending Ordinance 72-G and Chapter 29, City of St. Petersburg Code;

b. Declaring Ordinance 79-G to be null and void *ab initio* because of the failure of Defendant City to adopt the Ordinance in strict compliance with the requirements of § 166.041(3)(c). Florida Statutes;

c. Issuing a Temporary Injunction, enjoining the Defendant City from enforcing or attempting to enforce Ordinance 79-G against Plaintiff, pending the issuance of a Permanent Injunction;

d. Issuing a Permanent Injunction enjoining the Defendant City from attempting to enforce Ordinance 79-G against Plaintiff; and

e. Awarding costs and such other supplemental relief as may be just and appropriate.

COUNT III
PLAINTIFF IS ENTITLED TO AN IMPARTIAL QUASI-JUDICIAL TRIBUNAL TO HEAR ANY WAIVER APPLICATION TENDERED

53. Plaintiff re-alleges and incorporates ¶¶ 1 through 35, *supra*, as if fully set out herein.

54. Plaintiff has a right to a hearing of any tendered waiver application by an impartial tribunal.

55. If Plaintiff does not succeed in any tendered waiver application, its property interests in its business will be taken.

56. An impartial tribunal is an essential element to the waiver hearing, according to both State and Federal Constitutional law.

57. Based on information and belief, Plaintiff has reason to believe, and does believe, that it will be denied its Constitutional right to a fair hearing before an impartial tribunal, if any waiver application tendered is heard by the City Council.

58. Therefore, Ordinance 79-G will deprive Plaintiff of property without due process of law.

WHEREFORE, DOU-HAN, INC., prays for a declaratory judgment, for injunction and supplemental relief awarding some or all of the following relief:

a. Declaring Plaintiff's entitlement to a waiver hearing before an impartial tribunal;

b. Declaring Ordinance 79-G to be null and void *ab initio* because it deprives Plaintiff of the right to a waiver hearing before an impartial tribunal;

c. Issuing a Temporary Injunction, enjoining the Defendant City from enforcing or attempting to enforce Ordinance 79-G against Plaintiff, pending the issuance of a Permanent Injunction;

d. Issuing a Permanent Injunction enjoining the Defendant City from attempting to enforce Ordinance 79-G against Plaintiff; and

e. Awarding costs and such other supplemental relief as may be just and appropriate.

COUNT IV
IMPROPER LOCAL PLANNING AGENCY REFERRAL - NOTICE REQUIRED BY § 286.0105, FLORIDA STATUTES

59. Plaintiff re-alleges and incorporates ¶¶ 1 through 35, of the complaint herein as if fully set out herein.

60. By the admission of its own Assistant City Attorney, (Exhibit E at 14, lines 7), Ordinance 79-G is a Zoning Ordinance.

61. Section 163.3164 (22), Florida Statutes, in pertinent part, specifically defines the term: "Land Development Regulations" as including any "ordinances enacted by governing bodies ... includ[ing] any local government zoning ... regulation."

62. Therefore, City of St. Petersburg Zoning Ordinance 79-G is a Land Development Regulation as defined by § 163.3164 (22), Florida Statutes; further proof of which is found in the purported referral of Ordinance 79-G to the Local Planning Agency.

63. The City of St. Petersburg has an adopted Comprehensive Plan pursuant to Part II, Chapter 163, Florida Statutes.

64. Section 163.3194(2), Florida Statutes requires that, after the adoption of a Comprehensive Plan pursuant

to Chapter 163, Florida Statutes, all Land Development Regulations **shall** be reviewed by the Local Planning Agency prior to their adoption.

65. Ordinance 79-G was reviewed by the City of St. Petersburg Local Planning Agency.

66. Pursuant to Article IV of the Bylaws of the St. Petersburg Planning Commission, a public hearing was required to be held by the Planning Commission as part of its Local Planning Agency review of Ordinance 79-G; and notice of said public hearing was required to be given.

67. The Notice of the Public Hearing in the course of the Local Planning Agency review is included as Exhibit H, attached hereto and made a part hereof by reference.

68. It is undisputed that the hearing of which Notice was purportedly given by Exhibit H, was a hearing for which such notice was required to be given pursuant to § 166.041, Florida Statutes 1991.

69. Section 286.0105, Florida Statutes, provides:

> **"Notices of meetings and hearings must advise that a record is required to appeal.** -- Each board, commission or agency of this state, or of any political subdivision thereof **shall include** in the notice of any meeting or hearing, **if notice of the meeting or hearing is required**, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission, with

respect to any matter considered at such meeting or hearing, he will need a record of the proceedings, and that, for such purpose, he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. ..." [Emphasis added]

70. As evidenced by Exhibit H, the required advice did not appear on the Notice of Ordinance 79-G, and Ordinance 79-G is therefore null and void *ab initio*.

WHEREFORE, DOU-HAN, INC., prays for a declaratory judgment, for injunction and supplemental relief awarding some or all of the following relief:

a. Declaring Ordinance 79-G to have been improperly adopted for the failure of Defendant City to provide the advice mandatorily required by § 286.0105, Florida Statutes on the notice of the Local Planning Agency public hearing;

b. Issuing a Temporary Injunction, enjoining the Defendant City from enforcing or attempting to enforce Ordinance 79-G against Plaintiff, pending the issuance of a Permanent Injunction;

c. Issuing a Permanent Injunction enjoining the Defendant City from attempting to

enforce Ordinance 79-G against Plaintiff; and

d. Awarding costs and such other supplemental relief as may be just and appropriate.

COUNT V
MEANINGLESS LOCAL PLANNING AGENCY REFERRAL

71. Plaintiff re-alleges and incorporates ¶¶ 1 through 35, *supra*, as if fully set out herein.

72. By the admission of its own Assistant City Attorney, (Exhibit E at 14, lines 7), Ordinance 79-G is a Zoning Ordinance.

73. Section 163.3164 (22), Florida Statutes, in pertinent part, specifically defines the term: "Land Development Regulations" as including any "ordinances enacted by governing bodies ... includ[ing] any local government zoning ... regulation."

74. Therefore, City of St. Petersburg Zoning Ordinance 79-G is a Land Development Regulation as defined by § 163.3164 (22), Florida Statutes; further proof of which is found in the purported referral of Ordinance 79-G to the Local Planning Agency.

75. The City of St. Petersburg has an adopted Comprehensive Plan pursuant to Part II, Chapter 163, Florida Statutes.

76. Section 163.3194(2), Florida Statutes requires that, after the adoption of a Comprehensive Plan pursuant

to Chapter 163, Florida Statutes, all Land Development Regulations **shall** be reviewed by the Local Planning Agency prior to their adoption.

77. Ordinance 79-G was reviewed by the City of St. Petersburg Local Planning Agency.

78. However, said review occurred in derogation of the procedures of the City of St. Petersburg Local Planning Agency in that two notices of the public hearing were given on successive days, four and five days respectively before the hearing; whereas the procedures of the Local Planning Agency generally require that the notice be given twice, with a time lapse of approximately one week between the notices, and with the second notice appearing approximately one week prior to the hearing.

79. As evidenced by the contrast between the minutes of the Local Planning Agency review of Ordinance 72-G on the **second** hearing of that Ordinance (Exhibit I, attached hereto and made a part hereof by reference) and the minutes of the Local Planning Agency public hearing on Ordinance 79-G (Exhibit J, attached hereto and made a part hereof by reference), there was no meaningful public participation before the Local Planning Agency with respect to Ordinance 79-G, as a direct and proximate result of the meaningless and inadequate notice given of the Local Planning Agency public hearing.

80. Therefore, as a result of the meaningless notice given of the Local Planning Agency public hearing, Ordinance 79-G is null and void *ab initio*.

WHEREFORE, DOU-HAN, INC., prays for a declaratory judgment, for injunction and supplemental relief awarding some or all of the following relief:

a. Declaring Ordinance 79-G to be a Land Development Regulation;

b. Declaring Ordinance 79-G to have been improperly adopted for the failure of Defendant City's Local Planning Agency for review to comply with its own procedures and requirements in the conduct of the public hearing on Ordinance 79-G;

c. Issuing a Temporary Injunction, enjoining the Defendant City from enforcing or attempting to enforce Ordinance 79-G against Plaintiff, pending the issuance of a Permanent Injunction;

d. Issuing a Permanent Injunction enjoining the Defendant City from attempting to enforce Ordinance 79-G against Plaintiff; and

e. Awarding costs and such other supplemental relief as may be just and appropriate.

COUNT VI
COMPLAINT FOR ATTORNEY'S FEES

81. Plaintiff re-alleges and incorporates ¶¶ 1 through 80, *supra*, as if fully set out herein.

82. The actions of Defendants complained of herein were actions under color of state law designed to deprive Plaintiff of rights and privileges guaranteed by the Constitution and Laws of the United States, as well as the Constitution and laws of the State of Florida.

83. In its legitimate desire to pursue the rights and privileges guaranteed by the Constitution and laws of the United States, as well as the Constitution and laws of the State of Florida, the Plaintiff has employed the undersigned Attorney at Law to prosecute this action and has agreed to pay him a reasonable fee for same.

84. Accordingly, Plaintiff is entitled to an award of attorney's fees as provided for by 42 U.S.C. § 1988.

WHEREFORE, Plaintiff demands judgment as follows:

a. an award of attorney's fees;

b. Awarding costs and such other supplemental relief as may be just and appropriate.

VERIFICATION

STATE OF FLORIDA
COUNTY OF PINELLAS

Before me the undersigned authority, this day personally appeared Douglas Hanson, President, DOU-HAN, Inc., who after first being duly cautioned and sworn, states that he is the duly authorized representative of the Plaintiff Corporation in the above-styled cause, that he has read the foregoing Verified Complaint for Declaratory and Injunctive Relief and has personal knowledge of the facts and matters therein set forth and alleged; and that each and all of these facts and matters are true and correct.

_____
DOUGLAS HANSON, as
President of DOU-HAN, Inc.

The foregoing instrument was
acknowledged before me this
_____ day of _____, 1993
by _____
who is personally known to me or who
has produced a _____
as identification and who did take an
oath

_____
Notary Public

My Commission Expires:

Respectfully submitted,

_____

Luke Charles Lirot, Esq.
Florida Bar No. 714836
2000 Magnolia Drive,
Clearwater, Fl., 34624
(813) 874-2030
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above and foregoing has been furnished by hand to Mark Winn, Esq., Assistant City Attorney, City of St. Petersburg, 175 Fifth Street North, St. Petersburg, Fl., 33701, this _____ day of June, 1993.

_____

Luke Charles Lirot, Esq.

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

DOU-HAN, INC. a
Florida Corporation,

Plaintiff,

v. Case No. 93-1240-CI-16

THE CITY OF ST. PETERSBURG,
a Florida Municipal Corporation,

Defendant.

_____/

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
LIST OF EXHIBITS

Included With Original Complaint:

A. Ordinance 72-G
B. Ordinance 79-G
C. Minutes, City Council, 12/3/92
D. Transcript, City Council, 2/4/93
E. Transcript, City Council, 2/18/93
F. Notice, Ordinance 79-G, Published, *St. Petersburg Times*, 2/8/93

Included with Amended Complaint:

G. Sample Notice, City of St. Petersburg Ordinance Hearings

H. Notice of Local Planning Agency Review of Ordinance 79-G

I. Local Planning Agency Minutes, 11/30/92

J. Local Planning Agency Minutes, 2/11/93

APPENDIX B

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA CIVIL DIVISION

DOU-HAN, INC. a Florida Corporation,

Plaintiff,

v. Case No. 93-1240-CI-16

THE CITY OF ST. PETERSBURG, a Florida Municipal Corporation,

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

THIS CAUSE came on to be heard upon the Defendant's Motion to Dismiss Amended Complaint, on November 5, 1993 and after hearing the arguments of counsel and reviewing the entire Court file and Memoranda of counsel, it is hereby ORDERED AND ADJUDGED that:

1. Count I of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because the enactment of City of St. Petersburg O No. 79-G is a legislative act taken after a legislative hearing and the

requirements in Chapter 286.0105, Fla.Stat. apply only to quasi-judicial hearings.

2. Based on the findings of fact made by Judge Cope on May 27, 1993, Count II of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because Ordinance 79-G does not substantially change the permitted use categories in zoning districts nor does it rezone specific parcels of real property and therefore need not be adopted in the manner set out in Chapter 166.041(3)(c), Fla.Stat.

3. Count III of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because the Plaintiff has failed to exhaust its administrative remedies and because there is no present need for declaratory relief because there is no present state of facts or present controversy upon which to enter a declaratory judgment.

4. Count IV of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because there is no legal duty on the part of the City of St. Petersburg Local Planning Agency to hold a public hearing on Ordinance 79-G or publish notice thereof, therefore there can be no violation of the requirements in Chapter 286.0105, Fla.Stat.

5. Count V of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because there is no legal duty on the part of the City of St. Petersburg Local Planning Agency to publish a notice concerning its review of Ordinance 79-G.

6. Count VI of the Amended Complaint is dismissed with prejudice for failing to state a cause of action because there is no federal constitutional violation which could support a claim for attorney's fees.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff lacks standing to challenge the notification procedures used in enacting Ordinance 79-G because he appeared at the public hearing prior to its adoption and expressed his opposition thereto.

DONE AND ORDERED in Chambers, Clearwater, Pinellas County, Florida this 20th day of December, 1993.

/S/ RAY E. ULMER, JR.
Ray E. Ulmer, Jr.
Circuit Judge

copies furnished to:
Mark A. Winn, Esquire
Luke Lirot, Esquire

APPENDIX C

Supreme Court of the United States

No.

A-221

Dou-Han, Inc.,

Petitioner

v.

City of St. Petersburg

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be, and the same is hereby, extended to and including November 18, 1994.

/S/ ANTHONY M. KENNEDY
Associate Justice of the Supreme
Court of the United States

Dated this 29th
day of September, 1994.

FILED

94 992 NOV 18 1994

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOU-HAN, INC., a Florida Corporation,
Petitioner,

v.

THE CITY OF ST. PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida.
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LUKE CHARLES LIROT
2000 Magnolia Drive
Clearwater, Florida 34624
(813) 874-2030
(813) 879-0723 FAX

Counsel for Petitioner

INDEX TO SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX	DESCRIPTION
"D"	Per Curiam Affirmance from the Second District Court of Appeal of Florida, dated June 3, 1994;
"E"	Order Denying Motion for Rehearing, Second District Court of Appeal of Florida, dated July 7, 1994.

APPENDIX D

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

DOU-HAN, INC., a Florida corporation,

Appellant,

v.

CITY OF ST. PETERSBURG, a Florida municipal corporation,

Appellee.

Case No. 93-02202

Opinion filed June 3, 1994.

Appeal from the Circuit Court for Pinellas County; Ray E. Ulmer, Jr., Judge.

Luke Charles Lirot, Clearwater, for Appellant.

Michael S. Davis, City Attorney,
and Mark A. Winn, Senior Assistant
City Attorney, St. Petersburg, for Appellee.

PER CURIAM

Affirmed.

DANAHY, A.C.J., and ALTENBERND and QUINCE, JJ., Concur

APPENDIX E

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JULY 7, 1994

DOU-HAN, INC.,	)
	)
Appellant(s)	)
	)
v.	)
	)
CITY OF ST. PETERSBURG,	)
	)
Appellee(s)	)

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER

/s/
WILLIAM A HADDAD, CLERK

c: Luke Charles Lirot, Esq.
Mark A. Winn, Esq.
/PM

Respectfully submitted,

/s/ Luke Charles Lirot
LUKE CHARLES LIROT
Florida Bar No. 714836
2000 Magnolia Drive
Clearwater, FL 34624
(813) 874-2030

Counsel for Petitioner

DATED: November 30, 1994

(3)

Supreme Court, U.S.
FILED
JAN 17 1995
OFFICE OF THE CLERK

Case-No. 94-992

In The
Supreme Court of the United States
October Term, 1994

DOU-HAN, INC., Florida Corporation,
Petitioner,

v.

THE CITY OF ST PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida,
Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR RESPONDENT IN OPPOSITION

By: CITY ATTORNEY'S OFFICE
CITY OF ST PETERSBURG, FLORIDA

MICHAEL S. DAVIS, City Attorney

and

MARK A. WINN, Senior Assistant City Attorney
Counsel of Record for Respondent
P.O. Box 2842
St. Petersburg, Florida 33731
(813) 893-7401
Fax: (813) 892-5262

17 pp

QUESTION PRESENTED

I. Whether an entity who has not applied for a variance from a zoning regulation is entitled to a presumption that the administrative body which would hear the request for a variance is not fair and impartial, and that the ordinance which designated the administrative body to hear the request should be declared unconstitutional.

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RULES:

Rule 9.100(c), Fla. R. App. P. 4

ORDINANCES:

Ordinance 72-G. 1, 2, 4

Ordinance 79-G 1, 3

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the following exceptions and corrections:

Respondent is unaware whether the books, magazines and video tapes which Petitioner offers to the public are obscene or not obscene but accepts the Petitioner's characterization that they are sexually explicit. Respondent is unaware of any constitutional requirement which requires a local government to provide an opportunity for businesses to seek variances from zoning regulations. The Respondent's Board of Adjustment does not have jurisdiction over all other variance applications under the City's zoning regulations, the Mayor, the Environmental Development Commission and the City Council have jurisdiction over variance applications in some situations.

The conclusion that the Mayor wished to close a "loophole" which might have resulted in the granting of a variance is not supported by the record. The statements of certain City Councilmembers cited in the Petition are taken from the transcripts of many hours of public hearings held during the legislative process to enact Ordinance 72-G, not the challenged Ordinance 79-G. These public hearings were held approximately one year prior to any hearing on a variance request. Petitioner did request a variance but the judgment appealed from was entered prior to a hearing on Petitioner's request for a variance. The City of St. Petersburg has eight Councilmembers.

SUMMARY OF ARGUMENT

Petitioner asked the Circuit Court to presume that possibly, at some time in the future, Respondent's City Council could not be an impartial tribunal and fairly apply the standards and criteria of Ordinance No. 72-G to Petitioner's request for a variance. Petitioner asked the Circuit Court to find that the City Council would violate its rights and on this basis asked the Circuit Court to declare unconstitutional an ordinance that delegates certain duties to the City Council. The Circuit Court dismissed this count of the Amended Complaint because the Plaintiff failed to exhaust its administrative remedies and because there was no need for declaratory relief because there was no present state of facts or controversy upon which to enter declaratory judgment. The presumption which Petitioner asks this Court to make is contrary to the presumption established by this Court that adjudicators will act with honesty and integrity. The lower court has not decided a federal question in a way that conflicts with another state court of last resort or a United States Court of Appeals and has not decided an important question of federal law which should be settled by this Court nor has it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. While the issue Petitioner framed may be of importance, it is not the issue which was before the lower court when it dismissed this count of Petitioner's Complaint.

ARGUMENT IN OPPOSITION

The petition for writ of certiorari should not be granted because there is absolutely no indication that the decision rendered by the Second District Court of Appeals for the State of Florida in this case conflicts with any decision of another state court of last resort or a United States Court of Appeals. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court. It is particularly difficult to find any conflict since the Second District Court of Appeals affirmed without opinion. Petitioner's argument essentially revolves around Count III of its complaint which was dismissed for two reasons by the Circuit Court. The Circuit Court found that (1) Plaintiff failed to exhaust its administrative remedies and (2) there was no need for declaratory relief because there was not a present state of facts or present controversy upon which to enter a declaratory judgment finding the City's Ordinance 79-G unconstitutional.

Petitioner asks this Court to presume that all Councilmembers of the City of St. Petersburg from now until the end of time will not be fair and impartial in hearing requests for variances under this zoning regulation and on this basis asks this Court to declare Ordinance 79-G unconstitutional. He cites as support for this presumption brief statements of four Councilmembers (one of whom is no longer a Councilmember) made in the context of numerous hours of legislative hearings at which many members of

the public spoke concerning the adoption of Ordinance 72-G. Both the Circuit Court and the District Court of Appeal declined to make this presumption.

Respondent can find no cases which state that Respondent is constitutionally required to provide an opportunity for an entity to request a variance from a zoning ordinance. Nonetheless Ordinance 72-G provides for variances and provides standards and criteria to guide the City Council in determining whether to grant or deny a request for a variance. *Staton v. Mayer*, 552 F.2d 908 (10th Cir. 1977) distinguishes statements by a decision maker made on the merits of the case which comes before it and statements on policy issues, *Staton* at 914. None of the statements which Petitioner refers to were made during or concerning any request for a variance from the zoning regulation. All the statements were made during the legislative hearings adopting Ordinance 72-G. *Staton* goes on to say that, in that case, the legislature provided appellate remedies and that "...means are now available for an equitable solution protecting the right to a fair hearing" and that "...the appeal remedies can be used for a full review on the facts and a decision by other tribunals, if a challenge is made to the fairness of the tribunal and the new decision." In Florida, matters which are subject to quasi-judicial hearings, as these are, may be appealed by petition for writ of certiorari to the circuit court. Rule 9.100(c), Fla. R. App. P. If after its variance hearing Petitioner feels the City Council was not fair or impartial it may raise this issue in an appeal.

Generally a challenge to the constitutionality of a statute is to the statute either "as applied" or "on its face". In this case Petitioner does not allege that this statute is unconstitutional on its face or as applied, it argues that it is unconstitutional because it may be applied sometime in the future in an unconstitutional manner. Unfortunately for Petitioner this Court has not found that the possibility that an act may occur in the future is grounds to declare an ordinance unconstitutional. This Court has stated in *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Court 1673, 1982 (1968) that it is a "principle of constitutional law that Courts are not to strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The statements which Petitioner recites merely show that some Councilmembers generally do not like this kind of business, not that they will treat Petitioner's variance request unfairly.

The presumption which Petitioner asks this Court to make is not supported by the law as set forth by this Court or the Supreme Court of the State of Florida. This Court has allowed this presumption to be made only in situations where "the adjudicator has a pecuniary interest in the outcome" and where "he has been the target of personal abuse or criticism from the party before him". *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Neither of these situations occur here. This Court in *Withrow* went on to say that Petitioner "must overcome a presumption of honesty and integrity in those serving as adjudicators" and must convince the Court that there is such a risk of actual bias or prejudgment that, as applied in this case, the

legislators creating laws cannot implement those laws fairly. *Withrow* at 47. See also *Porter County Chapter v. Nuclear Regulation Commission*, 606 F.2d 1363, 1371 (D.C. 1979).

The The Florida Supreme Court made much the same policy statement in *City of Pompano Beach v. Big Daddy's. Inc.*, 375 So.2d 281, 282 (Fla. 1979) when it found that "it is a fundamental tenant of municipal law that when a municipal ordinance of legislative character is challenged in Court, the motives of the commission and the reasons before it which induce the passage of the ordinance are irrelevant." In Florida the presumption exists that "public officials properly perform their duties in accordance with the law and it is incumbent upon those challenging such performance to overcome the presumption" *Hillsborough County Aviation Authority v. Taller and Cooper. Inc.*, 245 So.2d 100, 102 (Fla. 2d DCA 1071). See also *City of Miami v. Kaiser*, 213 So.2d 449, 452 (Fla. 3rd DCA, 1968) (in the absence of sufficient showing to the contrary it is presumed that elected officials will perform their duties in a proper and lawful way manner). *Boardman v. Esteva*, 323 So.2d 259, 268, (Fla. 1976), (elected officials are presumed to perform their duties in a proper and lawful manner in the absence of a sufficient showing to the contrary). *Williams v. Smith*, 360 So.2d 417, 421 (Fla. 1978) (legislators are sworn to uphold the Constitution and are presumed to act in a lawful manner). And finally, in *Harden v. Garrett*, 483 So.2d 409, 410 (Fla. 1985) the Court stated that "If the principal of separation of powers is to be given any meaning or vitality whatsoever, it must mean that each of the branches of government, co-equal in constitutional

dignity, can trust the others to perform their assigned functions properly and conscientiously".

In this case the Circuit Court declined to presume that the City Council would not be a fair and impartial tribunal at some time in the future. The Second District Court of Appeal affirmed this finding. The presumption which Petitioner requested these courts to make this directly contrary to both federal and Florida Law. The presumption is, and should continue to be, that elected officials will perform their duties in accordance with the law. If they fail to act in accordance with the law, this can be corrected on appeal.

CONCLUSION

The petition for writ of certiorari should not be granted because there is absolutely no indication that the decision rendered by the Second District Court of Appeals for the State of Florida in this case conflicts with any decision of another state court of last resort or a United States Court of Appeals. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court. Not only is there no conflict but no federal question or important question of federal law has been decided which should be addressed by this Court.

FILED
FEB 8 1995
OFFICE OF THE CLERK

(4)

No. 94-992

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DOU-HAN, INC., a Florida Corporation,
Petitioner,

v.

THE CITY OF ST. PETERSBURG
A Florida Municipal Corporation,
and ROBERT BUTTERWORTH,
the Attorney General of the State of Florida,

Respondents.

PETITIONER'S REPLY BRIEF

LUKE CHARLES LIROT
2000 Magnolia Drive
Clearwater, Florida 34624
(813) 874-2030
(813) 879-0723 FAX

Counsel for Petitioner

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QUESTION PRESENTED

I. Whether an applicant for a variance from a zoning regulation, is entitled, under the Constitution of the United States, to a fair and impartial tribunal in a quasi-judicial/administrative action before a municipal board.

LIST OF PARTIES

Petitioner, Dou-Han, Inc., is a Florida Corporation doing business in Pinellas County, Florida. Respondent, the City of St. Petersburg, is a Florida Municipal Corporation. Respondent, Robert Butterworth is the Attorney General of the State of Florida.

Neither party has any parent or subsidiary corporation as contemplated by Rule 29.1, involved herein.

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STATEMENT OF THE CASE

The parties are in general accord with respect to the facts of the case, however, Petitioner would point out that adult use variances are the only variances from the City of St. Petersburg Zoning Ordinance which are heard by the City Council and not the Board of Adjustment.

The language of "closing a loophole," used as the explanation for modifying the body to hear any variance applications, is a verbatim quote of the Mayor, and thus is not a conclusion, but a statement of fact. If it is factually disputed, then the City's Motion to Dismiss should have been denied. *Conley v. Gibson,* 355 U.S. 41, (1957).

SUMMARY OF ARGUMENT

There is a constitutional mandate for a fair and impartial tribunal to hear applications for variances from zoning regulations. Petitioner was entitled to a declaratory judgment setting forth its rights, and was not required to exhaust its administrative remedies. This issue was squarely before the trial court (Petition for Writ of Certiorari, p. A-14,).

REPLY ARGUMENT

There is a constitutional mandate for a process by which variances from zoning regulations may be granted: *see, e.g. Reynolds v. Zoning Board of Review of Town of Lincoln,* 191 A.2d 350 (R.I. 1963); *Bieger v. Village of Moreland Hills,* 209 N.E.2d 218 (Oh. Int.App. 1965); *Palmer v. Board of Zoning Adjustment,* 287 A.2d 535. (D.C. App. 1972); and *Bouley v. City of Nashua,* 205 A.2d 38 (N.H. 1964), citing: *Nectow v. Cambridge,* 277 U.S. 183, 188, (1928).

This Honorable Court recently decided the issue of the need to exhaust administrative remedies in cases brought under 42 U.S.C. § 1983: *Howlett v. Rose,* 496 U.S. 356 (1990), a case arising from the very same jurisdiction as the instant case. Under *Howlett,* Petitioner had no need to exhaust its administrative remedies before commencing this action.

Finally, Petitioner is entitled, as a matter of federal constitutional law, (as well as Florida statutory law,) to the entry of a declaratory judgment in this action, and this action is not premature in these circumstances: *Railroad Transfer Service, Inc. v. the City of Chicago,* 386 U.S. 351 (1967).

Accordingly, Respondents' arguments are without merit, and this Honorable Court should address this important federal question.

CONCLUSION

This Court has ruled, in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,* _____ U.S. _____, 113 S.Ct. 2264 (1993), that, as a matter of due process of law, a quasi-judicial process must be conducted by fair and impartial tribunal. This Court has further held that post-hearing remedies are constitutionally inadequate.

Accordingly, the lower courts erred in dismissing the Complaint herein. Because so many land use decisions are now being made in a quasi-judicial fashion, the question presented herein is of paramount importance throughout the country, and requires a decision by this Honorable Court.

Respectfully submitted,

Luke Charles Lirot, Esquire
2000 Magnolia Drive
Clearwater, FL 34624
(813) 874-2030
Counsel of Record

Attorney for Petitioner